



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2
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OCT 29 2003

Clifford G. Day
Supervisor, New Jersey Field Office
U.S. Fish and Wildlife Service
927 North Main Street (Bldg. D1)
Pleasantville, New Jersey 08232

RE: 2002 Revisions to the New Jersey Surface Water Quality Standards

Dear Mr. Day:

This letter responds to your August 5, 2003 letter concerning the U.S. Environmental Protection Agency's (EPA) proposed approval of the State of New Jersey's Surface Water Quality Standards (NJSWQS). Below, you will find EPA's response to your comments point by point, in the order presented in your letter.

Withdrawal of Concurrence with 1999 Proposed Revisions:

Your letter indicates that the FWS has withdrawn its concurrence with the proposed 1999 revisions to the NJSWQS based on the fact that the final 2002 revisions did not include the agreed-upon language in the State's antidegradation policy, nor had New Jersey adopted the wildlife criteria for PCBs, DDT and mercury jointly developed by FWS, EPA, and the New Jersey Department of Environmental Protection (NJDEP). Please be aware that EPA recognizes the importance of including these provisions in the NJSWQS and we remain committed to working with the NJDEP to ensure that these agreed-upon provisions are included in the NJSWQS as soon as possible. Both of these provisions are discussed in more detail below.

Scope of Service Review:

In this section, you discuss 50 CFR Part 402.09, which states in part, that after initiation or reinitiation of consultation, the Federal agency may make no irreversible or irretrievable commitment of resources with respect to the agency's action that may have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives which may be necessary to avoid violation of section 7(a)(2) of the Endangered Species Act (ESA). We fully acknowledge this restriction in the regulation, but do not see its applicability to EPA's approval of the 2002 revisions to the NJSWQS. Obviously, replacing less protective standards with those that are more protective would only improve the existing situation and would not foreclose any beneficial measures. The 2002 revisions to the NJSWQS are more protective of the environment, and therefore of endangered or threatened species, than are the 1994 standards that they replaced.

You have also requested that a Biological Evaluation (BE) be prepared for the changes generated by the 2002 revisions to the NJSWQS pursuant to the ESA and EPA's obligations under the 2001 Memorandum of Agreement (MOA) among the EPA, FWS, and the National Marine

Fisheries Service. EPA acknowledges this request and a BE will be prepared in accordance with appropriate guidance.

Antidegradation Policy:

As previously stated, we concur with your assessment that the NJSWQS must include the FWS recommended language in its antidegradation policy. EPA also recognizes that the lack of an implementation policy limits the protection of federally listed and proposed species. To this end, EPA paid particular attention to the commitment to propose changes to the antidegradation policy as part of the NJSWQS in the State's current Performance Partnership Agreement. We will work with the State to ensure that this commitment is met.

Reclassifications:

The existing Federal water quality standards regulation does not specify which State waters should be designated to receive enhanced protection under the State's antidegradation policy. The state continues to have the authority and discretion to designate certain State waters as waters of exceptional significance. EPA notes that the NJDEP continues to make progress in reclassifying waters of exceptional ecological, recreational and/or water supply significance, or exceptional fisheries resources, to C1. On October 1, 2003, EPA approved the reclassification of 15 waters to C1, and October 7, 2003, NJDEP proposed the reclassification of seven additional waters to C1. We encourage the Service to continue recommending candidate waterbodies for reclassification as C1.

Wildlife Criteria:

EPA concurs that the 2002 Revisions to the NJSWQS did not fulfill the terms and conditions within the Service's 1996 Biological Opinion (BO) (as amended) regarding development and adoption of numeric wildlife criteria for PCBs, DDT and mercury. As you are aware, EPA has continued to work with the FWS and NJDEP in an effort to complete the response to comment document, which is necessary for State adoption of these wildlife criteria. In addition, EPA sent a letter dated October 15, 2003 to Mr. Gary Sondermeyer, Chief of Staff of NJDEP, (attached) in which we strongly recommend NJDEP's adoption of these wildlife criteria as soon as possible, preferably before the November 18, 2003 "sunset" date. Subsequent to the transmittal of the letter, NJDEP personnel informed my staff that, as they had receive a significant volume of public comments questioning the implementation of the wildlife criteria, they believed that the actions needed to address the comments could not be made on adoption of the criteria, but required a new rule proposal as per the New Jersey Administrative Procedures Act.

At a meeting on October 28, 2003, Leslie McGeorge, Administrator, Water Monitoring and Standards in NJDEP officially informed EPA staff that Commissioner Campbell has decided to allow the proposed rule to lapse and to re-propose the wildlife criteria and an implementation plan within a six month time frame. }

Given the fact that Commissioner Campbell continues to be committed to the successful completion of this adoption, EPA has made the decision to work with NJDEP to follow through on its proposed schedule for adoption of the wildlife criteria. We believe that this continues to be the quickest way to accomplish our joint goal to have New Jersey adopt wildlife criteria as

compared to EPA promulgating the wildlife criteria for New Jersey. I have requested my staff to arrange a meeting between FWS and NJDEP to work on this issue as soon as possible.

Mixing Zones:

EPA believes that the adopted policy meets the Service's 1996 BO (as amended) and is protective of all endangered or threatened species. We concur with the Service's interpretation of 7:9B-1.5(h)5vii to mean that no mixing zones are to occur where they could extend into threatened or endangered species habitats.)

Metal Translators:

In May 1995, EPA formally revised the national aquatic life criteria for metals to express these criteria as the dissolved form of the metal. The National Toxics Rule (NTR) was formally amended to reflect these revisions. Because NJDEP has not yet adopted aquatic life criteria for the applicable metals, the NTR aquatic life criteria for metals remain the applicable criteria for these metals in the State of New Jersey.

While the ambient water quality criteria are expressed as the dissolved form of the metal, effluent limitations must be expressed as the total recoverable form of the metal. Therefore, in order to go from a total recoverable effluent limit to a dissolved ambient criterion, a translator is necessary to determine what fraction of the metal in the effluent will be dissolved in the receiving water. EPA issued guidance on this in June 1996, entitled "The Metals Translator: A Guidance for Calculating a Total Recoverable Permit Limit from a Dissolved Criterion." This guidance recommends as a rebuttable presumption that in the absence of a site-specific translator, EPA's conversion factors should be used as the translator.

In 2002, NJDEP adopted EPA's conversion factors as the State translators. Consistent with the national guidance, these translators are to be used only in the absence of site-specifically derived translators. The result is that NJDEP uses both the national aquatic life criteria for metals and the nationally-recommended translators for these metals.

As you are aware, EPA has entered into informal consultation with the Services on the Clean Water Act (CWA) section 304(a) aquatic life criteria. EPA and the Services agreed in the MOA that if, during the national consultations, EPA proposes to take an action approving or promulgating State or Tribal water quality criteria that are identical or more stringent than the existing 304(a) criteria, such an action will be covered by the national 304(a) consultations, and EPA may proceed with its action during the national 304(a) consultations. The Region believes that its approval of the metals translators in New Jersey falls into this category.

consultation
won't
include
translators

Further, we understand that the FWS is concerned that to date there has not been a consultation on the underlying dissolved metals criteria. It is our expectation that the current national consultation will address all of these concerns. If this consultation shows that the criteria and or translator(s) for one or more of the metals is not adequately protective of threatened and endangered species, EPA would require the State to revise the applicable criteria or translator(s). In summary, this is an issue that will be dealt with on the national level.

Total Dissolved Solids:

The effect of the 2002 revisions for total dissolved solid criteria to endangered and threatened species will be addressed in the BE.

Lead Criteria:

As stated in your letter, NJDEP's lead criterion of 5 ug/L (total recoverable) remains an applicable criterion for all FW-2 waters in New Jersey. With regard to the revised aquatic life criteria for lead, EPA has previously provided FWS with its analysis to determine whether the NJDEP's non-hardness dependent freshwater acute and chronic criteria for lead are sufficiently protective of federally-listed aquatic life species.

As part of this analysis, EPA identified all of the federally-listed aquatic life species in New Jersey. The analysis resulted in a finding that the dwarf wedgemussel was the only species that was potentially effected by the adoption of the aquatic life criteria for lead. Further, the only identified locations where the dwarf wedgemussel may occur are portions of the Pequest River and Paulins Kill. A data retrieval was conducted to determine the range of ambient hardness, as well as the ambient concentrations of lead, in these waterbodies. The results of these data retrievals showed that ambient hardness of these waters ranged from 116.0 mg/L to 240.0 mg/L as CaCO_3 , with a mean value of 185.1 mg/L as CaCO_3 . In addition, ambient lead concentrations ranged from 0 - 4 up/L, compared to EPA's current national recommended chronic water quality criterion of 5.3 up/L at a hardness of 200 mg/L as CaCO_3 . Consequently, EPA determined that NJDEP's non-hardness dependent freshwater aquatic life criteria for lead will not have an adverse effect on the potential dwarf wedge mussel populations in the Pequest River and Paulins Kill.

It should be noted that the NTR freshwater aquatic life water quality criteria for lead remain in effect as the enforceable criteria in New Jersey for CWA programs until EPA officially withdraws New Jersey from the NTR for lead. Further, lead will be addressed as part of the above referenced national consultation. If this consultation process identifies the need to modify the lead criteria, EPA will require the NJDEP to revise it accordingly.

Narrative Criteria:

As you point out, this narrative criteria was not changed in the 2002 revision to the NJSWQS. Therefore, it was not part of EPA's approval action, which only addressed the new or revised elements of the NJSWQS. As you know, the water quality standards review and revision is an ongoing process. As a matter of practice, EPA provides its priorities to the State for consideration as part of each rulemaking process. We would invite FWS to provide us with all of your priorities and concerns, such as the one raised here, so that we can share them with the State.

Absent Criteria:

Your comments are noted, and EPA will continue work with the State to adopt numeric criteria for those pollutants for which no numeric criteria currently exist. It must be noted that in most cases where NJDEP has not adopted criteria (such as for zinc, copper, methyl chloride and

phenanthrene), the NTR criteria remain the enforceable criteria for the State. In other cases, such as for aluminum and iron, despite the fact that the State does not have numeric criteria for these substances, they do have an applicable narrative criteria. To interpret narrative criteria, and develop numeric effluent limits, the State would use EPA's national criteria.

401 Certification:

Your comments are noted. We would welcome FWS's input in the development of applicable implementation procedures.

National Consultation:

Your comments are noted.

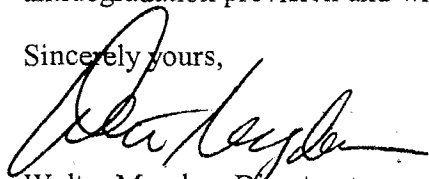
In summary, EPA acknowledges the need to complete the actions that have been committed to as a result of the 1996 BO, including the adoption of the antidegradation provisions and wildlife criteria by NJDEP. With regard to the 2002 revisions to the NJSWQS, EPA acted only on the new or revised elements. EPA believes that these new and revised standards enhance the protection of aquatic ecosystems, including listed species dependent on them, because they impose more stringent water quality standards than previously existed for waters in New Jersey.

However, EPA will prepare a formal BE that will include an analysis of the potential direct, indirect and cumulative effects of the action on federally listed species. Moreover, the BE will address the specific elements of the 2002 revisions raised in your letter regarding total dissolved solids and lead criteria. We will also continue to work with the State of New Jersey to adopt the wildlife criteria that have been jointly developed by the FWS, NJDEP and EPA, and to adopt the agreed upon language for antidegradation policy.

Please be aware that the views and opinions expressed in this letter are comments and recommendations, and do not constitute administrative determinations or decisions, approvals, or disapprovals. In particular, these views and opinions do not constitute a determination by the Agency, the Administrator, or a delegate of the Administrator within the scope of the Clean Water Act, §303(c), 33 U.S.C. §1313(c).

If you have any questions regarding these responses, please have your staff contact Lingard Knutson at 212-637-3747. We will keep you apprised of NJDEP's adoption of the antidegradation provision and wildlife criteria.

Sincerely yours,



Walter Mugdan, Director
Division of Environmental Planning and Protection